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International Union of Operating Engineers, Local Union No. 150, a/w International Union of Operating Engineers, AFL–CIO *and* Maglish Plumbing, Heating & Electric, LLC. Case 25–CC–230368

August 27, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On October 16, 2019, Administrative Law Judge Kimberly Sorg-Graves issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order dismissing the complaint.[1]

The Charging Party, Maglish Plumbing, Heating & Electric, LLC (Maglish), is partly owned by Gary Carroll. The Union had a primary labor dispute with Davis & Son Excavation (Davis), which performed work on the construction of Carroll's personal residence and at other Maglish jobsites.[2] On October 4 and 5, 2018,[3] at a public intersection near Maglish's place of business, the Union displayed a 3-by-8-foot stationary banner reading, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS." Next to that banner, the Union also displayed a 12-foot tall stationary inflatable rat with a 16-by-24-inch sign taped to its chest reading, "Gary, the lying rat."[4] Carroll reported seeing vehicles parked further down the street from these displays, but he did not see any individuals. From October 8 through 18, in a public right-of-way near Carroll's residential construction site, the Respondent displayed the same stationary banner and inflatable rat. Carroll reported seeing two or three cars near the displays and, on a single occasion, an unidentified individual outside of the cars. The record contains no evidence of any employer or employee refusing to perform work or to make a delivery at either site or any information about employees' exposure to the displays at either site. No party asserts that any union agents marched, patrolled, distributed materials, shouted, chanted, or verbally confronted anyone at either site.

Consistent with the Board's recent decision in *Operating Engineers Local 150* (*Lippert Components, Inc.*), 371 NLRB No. 8 (2021), we affirm the judge's findings that the Union did not violate Section 8(b)(4)(i) or (ii)(B) of the National Labor Relations Act by displaying a banner and an inflatable rat near Maglish's place of business and the residential construction site.[5]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 27, 2021

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Lauren McFerran, Chairman

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Marvin E. Kaplan, Member

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[1] On February 4, 2021, the then-Acting General Counsel filed a Motion to Remand the complaint to the Regional Director for dismissal or, alternatively, to dismiss the complaint. With this decision on the merits, the Acting General Counsel's motion is moot.

[2] Carroll acted as the general contractor for the construction of his residence. Although the judge found that the record was unclear whether Carroll acted in that capacity on behalf of Maglish, she found that Maglish employees performed work at that jobsite. At the time of the Union's displays, no one lived on the property.

[3] All subsequent dates are in 2018.

[4] As fully explained in the judge's decision, the reference to Carroll as a "lying rat" arose from an October 3 incident involving Carroll and a union agent. There is no allegation that the Union's conduct on October 3, including the display of a picket sign on that date in connection with the Union's primary labor dispute with Davis, violated the Act. There are no exceptions to the judge's finding that the fact that the rat-and-banner displays at issue followed the October 3 picketing does not support a finding that the displays were unlawful.

[5] In affirming the judge, Members Kaplan and Ring additionally rely on the principles articulated in their concurrence in *Lippert*. See 371 NLRB No. 8, slip op. at 3–7. As fully explained there, Congress enacted Sec. 8(b)(4) to protect neutral employers from being enmeshed in labor disputes not their own, and Members Kaplan and Ring are committed to the vigorous enforcement of that statutory provision, within the limits set by Congress as interpreted by the Supreme Court. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), the Supreme Court made clear that where secondary union activity seeks to achieve its objective through intimidation, it may be found unlawful without "pos[ing] serious questions of the validity of § 8(b)(4) under the First Amendment." Id. at 575. But where such activity—handbilling or otherwise—employs "mere persuasion" to achieve its goal, the Board must avoid raising those questions and find that the conduct does not violate Sec. 8(b)(4). Id. at 580. For the reasons stated in their concurring opinion in *Lippert*, Members Kaplan and Ring find that the rat-and-banner displays at issue here, like those at issue in *Lippert,* do not fall within the ambit of Sec. 8(b)(4)'s prohibitions.

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Tiffany Limbach and *Raifael Williams, Esqs.,* for the General Counsel.

Charles R. Kiser, Esq. (International Union of Operating Engineers, Local 150), for the Respondent.

DECISION

INTRODUCTION

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. The International Union of Operating Engineers, Local Union No. 150 displayed a 12-foot inflatable rat bearing a sign that read, "Gary[1] is a liar" in proximity to a 3' by 8' banner that read, "Shame on Maglish for Harboring Rat Contractors" at an intersection down the road from Maglish Plumbing, Heating & Electric, LLC's shop and at one of its construction sites. Between one and three Local 150 agents remained in nearby vehicles while the display was present. The record contains no evidence that Local 150 agents engaged in any conduct other than erecting and monitoring the inflatable rat and banner. Notably there was no picketing, use of picket signs, patrolling, chanting, blocking of ingress or egress, disruption of work or deliveries, or interaction between the Local 150 agents and employees or the general public. The government does not assert that Respondent's actions were unlawful under current Board precedent but argues that existing precedent should be changed to find that Respondent's conduct here violated Section 8(b)(i) and (ii)(B) of the National Labor Relations Act. I find that under current Board law Local 150's nonconfrontational, stationary displays did not violate Section 8(b)(i) or (ii)(B) of the Act.

STATEMENT OF THE CASE

On February 7, 2018, Region 25 (Region) of the National Labor Relations Board (Board) issued the complaint in this matter based on a charge filed on November 2, 2018, by Maglish Plumbing, Heating & Electric, LLC (Maglish) and docketed as Case 25–CC–230368. (GC Exh.1(c).)[2] The complaint alleges that the International Union of Operating Engineers, Local Union No. 150, a/w International Union of Operating Engineers, AFL–CIO (Respondent or Local 150) by displaying a large, inflatable rat and a stationary banner near Maglish's place of business and one of its residential construction sites induced or encouraged persons engaged in commerce to refuse to handle or work on goods or to perform services and has threatened, coerced or restrained Maglish and other persons engaged in commerce in violation of Section 8(b)(4) of the National Labor Relations Act (Act).

I heard this matter on May 15, 2019, in South Bend, Indiana. I afforded all parties a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, and argue orally on the record. Counsel for General Counsel of the Board (General Counsel) and Respondent filed posttrial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witness and the parties' briefs, I find that the Respondent did not violate the Act by placing an stationary inflatable rat and banner at an intersection close to Maglish's business and at the construction site for the home of one of Maglish's owners, who was also the general contractor for that construction site.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Maglish Plumbing, Heating & Electric, LLC is a corporation with an office and a place of business in Portage, Indiana that engages in mechanical contracting, including heating, plumbing and electrical work. In conducting its operations during the 12 months preceding the hearing, Maglish purchased and received goods valued in excess of $50,000 directly from points outside the State of Indiana. The parties stipulate, and I find, that Maglish has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. 9).

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(e) and 1(f).) Based on the foregoing, I find that this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

The sole witness in this hearing was Gary Carroll (Carroll), part owner of Maglish since 2004. Respondent has no history of representing Maglish employees or engaging in recognitional or organizational activities with Maglish or its employees. (Tr. 32.) The record contains no evidence of Maglish employees ever being represented by a union. Carroll had no interactions with Respondent prior to October 3, 2018.[3]

Carroll is familiar with the company Davis & Son Excavation (Davis), because they performed work on the construction of Carroll's personal residence on Division Road in Valparaiso, Indiana and other work for Maglish. (Tr. 18.) Carroll was the general contractor for the construction of his residence. The record is unclear if Carroll was performing the general contractor position on behalf of Maglish, but Maglish employees performed work on the residential jobsite. (Tr. 34.) Construction started in August 2018 and was ongoing as of the date of the hearing. (Tr. 19.) Davis continued to perform some work at the residential jobsite until some unknown date after October 5, and had a dozer present at the jobsite until about October 12.

[1] Gary is a reference to one of Maglish Plumbing, Heating & Electric, LLC's owners.

[2] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, and "R. Exh." for Respondent's exhibits. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

[3] All dates are in 2018, unless otherwise noted.

(Tr. 19–20.)

On October 3, Maglish employees were present on the jobsite. (Tr. 34.) As part of the construction process, Davis delivered a load of sand to the construction site. (Tr. 19.) Respondent's agent, Jake Wetzel (Wetzel), followed the Davis truck to the jobsite and parked in the right-of-way. (Tr. 19–20.) Wetzel exited his vehicle with a picket sign stating, "Local 150 on strike," Davis' name, and "Unfair Labor Practice."[4] (Tr. 22.) Carroll immediately approached Wetzel and said, "Get the fuck[5] off my property!" (Tr. 21.) Wetzel responded by directing Carroll not to hit him. Carroll denied making a motion that would have led Wetzel to believe he was going to hit him and denied that he was close enough to do so.[6] (Tr. 21.) Carroll did not say anything more to Wetzel or the other agent of Respondent that arrived later. Carroll testified that Respondent's other agent said to him, "[You] don't seem so tough now, big boy, and how would you like a nice rat in front of your shop?" (Tr. 21.) At some point after Wetzel arrived, Carroll directed one of his employees to call the police. (Tr. 36.) When the Porter County Police arrived, Carroll complained that the Local 150 agents were trespassing on his property and blocking traffic. The officer viewed the situation and took no action against Respondent's agents.[7] (Tr. 37.)

On October 4 and again on October 5, two Local 150 Business Agents erected a stationary inflatable rat, approximately 12 feet in height, with a sign taped to its chest reading, "Gary, the lying rat," which was 24 inches by 16 inches. It was erected at the intersection of Old Porter Road and Route 20 in Portage, Indiana. (Tr. 9–10, 23–24; Jt. Exhs. 2 and 3.) Posted in front of the inflatable rat was a stationary banner approximately 3 feet tall and 8 feet long, that read in black print on a white background, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS." (Tr. 9–10, 24; Jt. Exhs. 1, 2, and 3.)

Carroll saw the inflatable rat and banner display at this location at about 7:30 a.m. on both October 4 and 5. How long they remained there each day is not in the record. He also saw vehicles parked a little further from the intersection down the embankment. Carroll did not see any individuals. (Tr. 25–26; Jt. Exh. 1.) Carroll described the inflatable rat as 12 feet tall, brown, and with his hands up in the air. (Tr. 23.) In response to leading questions, Carroll further elaborated that it had teeth and "the hands looked [like] it might have had claws on it." (Tr. 23–24.) Carroll was then asked: "Was there anything else that you remember about the rat, what it looked like, its demeanor?" He responded, "I guess it was designed to look scary, if that's what you want to view it as." (Tr. 24.)

Starting on about October 8, and continuing daily through about October 18, Respondent displayed the same or virtually the same inflatable rat with the sign reading, "Gary, the lying rat," taped to its chest and the same or virtually the same banner at Carroll's residential construction site on Division Road. (Tr. 10, 28–31; Jt. Exh. 4.) The inflatable rat was placed east of the driveway for the house under construction in the public right-of-way facing Division Road. The banner was positioned to the side of the inflatable rat in the public right-of-way and was facing Division Road. The inflatable rat and banner were staked and tethered to the ground. Their distance from the driveway is not clear in the record. Based upon the photographic evidence, at that time the structure consisted of the basement/foundation of the house and no one was living on the property. (Tr. 41–42; Jt. Exh. 4.) The foundation of the home is about 80 feet from Division Road. (Tr. 42.) Also present were 2 or 3 cars but Carroll only saw a person outside of the cars on one occasion. He did not speak to that person. (Tr. 30.)

On November 2, Carroll, on the behalf of Maglish, filed the charge in this case. (GC Exh. 1(a).) On December 12, Respondent filed a charge in Case 25–CA–232405 alleging that on October 3, Maglish falsely reported to the police that Respondent's agents were blocking traffic and were trespassing on private property in violation of Section 8(a)(1) of the Act. (Tr. 38; GC Exh. 1(f) Exhibit A.) Region 25 found merit to that charge and Maglish executed an informal settlement agreement to resolve that case on March 15, 2019. (Tr. 39; GC Exh. 1(f) Exhibit B.) As part of that settlement agreement Maglish was required to post a notice to its employees containing the following paragraphs:

> WE WILL NOT contact or direct our employees to contact the Porter County Police Department in order to seek the removal or arrest of representatives of the International Union of Operating Engineers, Local No. 150, a/w International Union of Operating Engineers, AFL-CIO (the Union), who were engaged in lawful picketing on a public right of way.
>
> WE WILL NOT photograph representatives of the Union, who were engaged in lawful picketing on a public right of way, while in the presence of our employees. (Tr. 39; GC Exh. 1(f) Exhibit B.)

The record contains no evidence of any employer or employee refusing to perform work or make a delivery to the Maglish shop or the construction site and no direct information about employees' exposure to the displays at either site. For example, there is no evidence of when or how often Maglish or Davis or other employees go to the Maglish shop versus reporting to an assigned jobsite; and therefore, how likely they were to see the banner and inflatable rat display on October 4 and 5. Similarly, there is no evidence about any workers being present or deliveries being made at the construction site while the banner and inflatable display was present. Furthermore, there is no evidence of the timing of when the displays were present in comparison to when employees or deliveries were likely to

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[4] The record contains no allegation or evidence that Respondent's unfair labor practice picketing of Davis was in any way unlawful.

[5] On the record, Carroll stated "Get the "F" off . . ." instead of "Get the 'fuck' off . . ," but I understood he made this substitution due to the nature of the hearing setting.

[6] I generally found Carroll to be a credible witness. His testimony was consistent with the parties' stipulations of the facts and pictorial evidence. Except in response to questions about why Wetzel would have responded to him in this way, I found nothing in his demeanor that made me question his credibility. During this questioning he appeared more tense and less forthcoming. Although I find that Carroll was at least not objective in his responses to these questions, I further find that the interchange between Carroll and Wetzel is ancillary to the issues of this case.

[7] As discussed more below, the documentary evidence indicates that Carroll also took pictures of the picketers in the presence of employees.

come and go.[8]

III. ANALYSIS

A. Primary and Secondary Labor Disputes Under Section 8(b)(4)

Section 8(b)(4)(ii)(B) of the Act states that "it is an unfair labor practice for a labor organization or its agents. . . to threaten, coerce, or restraint a person engaged in commerce… forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person…." 29 U.S.C. § 158(b)(4)(ii)(B). In applying this provision, the Board and courts have determined that certain types of boycotts and picketing are prohibited depending on the status of the employer. A primary employer is directly involved in a labor dispute with a union, and a secondary employer may do business with the primary employer but has no independent labor dispute with the union concerning its own employees. Thus, there is a two-step inquiry: (1) whether the disputed conduct was directed at a primary or secondary employer; and (2) whether the disputed conduct threatened, coerced, or restrained employees, customers, suppliers, etc. from engaging in work or business with the secondary to coerce the secondary into ceasing business with the primary employer. *NLRB v. Local 825, International Union of Operating Engineers, AFL–CIO*, 400 U.S. 297, 402–404 (1971). For example, traditional picketing conduct of carrying picket signs and patrolling near a secondary employer's facility has been determined to be unlawfully coercive under Section 8(b)(4)(ii)(B). *Electrical Workers IBEW Local 2208 (Simplex Wire)*, 285 NLRB 834 (1987) ("If [the employer] is a neutral, then the picketing had a secondary object of coercing [secondary employer] to pressure [primary employer] to resolve its labor dispute, to which [secondary employer] was not a party.").

Determining with whom the labor organization has a primary dispute and at whom the disputed conduct is directed is often difficult. Section 2(9) of the Act provides a definition of a labor dispute which includes "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 USC § 152(9). In determining whether a primary labor dispute exists pursuant to this definition one must consider whether, "the union's conduct is intended to benefit the targeted employer's employees or whether the conduct is intended to satisfy the union's objectives elsewhere." *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644–645 (1967); See also *NLRB v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine, and General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 U.S. 507, 528 (1977).

In the instant case, Respondent asserts that it had a primary labor dispute with Maglish, because Carroll engaged in an unfair labor practice by calling the police and taking pictures of its agents while they lawfully picketed Davis at the jobsite. Respondent further asserts that its inflatable rat and banner displays were in response to its primary labor dispute with Maglish, and regardless of whether the displays are found to constitute picketing or otherwise coercive conduct, they were legal protests of a primary dispute. In support of this contention Respondent cites Maglish's settlement of Case 25–CA–232405 and legal precedent. See *NLRB v. Local 103 Iron Workers, AFL–CIO*, 434 U.S. 335, 342–343 (1978); *Geske & Sons*, 317 NLRB 28, 55 (1995); and *Blue Diamond Coal Company*, 166 NLRB 271, 278 (1967).

As General Counsel concedes in brief, Respondent could have lawfully engaged in unfair labor practice picketing against Maglish. Yet, the language of Respondent's banner does not fully support Respondent's contention that it's inflatable rat and banner displays were solely addressing its primary labor dispute with Maglish. Thus, I must resolve the question of whether Respondent's displays were solely addressing its primary labor dispute with Maglish, or whether they, at least in part, were addressing a primary labor dispute with Davis, to which Maglish was secondary.

In resolving this issue, I find the language Respondent used in its displays instructive.[9] The sign taped to the inflatable rat's chest stating, "Gary is a liar," was arguably intended to benefit Maglish's employees by addressing Gary Carroll's statements to the police that the Local 150 agents were trespassing and blocking traffic while picketing Davis at the residential jobsite. Based upon the record, I cannot definitively state what the ob-

[8] The parties stipulated to several of the operative facts. While these stipulations are incorporated into my findings above, I set them forth here to note there is no dispute with regards to the following facts:

-From at least October 3rd, 2018, until an unknown date, Gary Carroll, part owner of Maglish, served as the general contractor for the construction of his personal residence in Valparaiso, Indiana. (Tr. 9.)

-On October 4 and 5, 2018, two Local 150 Business Agents posted a stationary banner approximately 3 feet tall and 8 feet long, that read, "Shame on Maglish for harboring rat contractors," which was located at an intersection at Old Porter Road and Route 20 in Portage, Indiana. (Tr. 9.; Jt. Exh. 1.)

-On about October 4th, and October 5th, 2018, two Local 150 Business Agents placed an inflatable rat, approximately 12 feet in height, holding a sign reading, "Gary, the lying rat," which was 24 inches by 16 inches, at an intersection located at Old Porter Road and Route 20 in Portage, Indiana. (Tr. 9–10; Jt. Exhs. 2 and 3.)

-On about October 8th, 2018, and continuing daily through October 18th, 2018, two Local 150 Business Agents placed an inflatable rat, approximately 12 feet in height, holding a sign reading, "Gary, the lying rat," near the jobsite along Division Road in Valparaiso, Indiana. The dimensions of that sign are 24 inches by 16 inches. (Tr. 10; Jt. Exh. 4.)

[9] Also, Respondent's delay in filing unfair labor practice charges against Maglish until well after it ceased its displays and after the charge in the instant case was filed against Respondent, weighs against a finding that Respondent was solely addressing a primary dispute with Maglish.

ject of that sign was, but I find that the language of the banner, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS," was clearly intended to satisfy Respondent's objectives elsewhere with Davis.[10] Therefore, I find that Respondent's displays were, at least in part, directed at a labor dispute with Davis to which Maglish was a secondary. Based thereon, I must determine whether the displays were prohibited by Section 8(b)(4) of the Act.

B. Did Respondent's Banner and Inflatable Rat Displays Violate Section 8(b)(4)(ii)(B)?

In *DeBartolo Corp. v. Florida Gulf Coast Bldg.*, 485 U.S. 568 (1988), the Supreme Court found no violation of Section 8(b)(4) of the Act as a result of peaceful handbilling of a secondary employer where the handbill advertised a labor dispute with a contractor of the secondary employer and asked the public to not patronize the secondary employer. The Court cited *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), for the proposition that Section 8(b)(4)(ii)(B) of the Act does not proscribe all peaceful consumer picketing at the sites of secondary employers. Id. at 578. The union in *DeBartolo* had a primary dispute with a construction company for allegedly paying substandard wages and fringe benefits. DeBartolo, a mall owner, contracted with the construction company to build a department store in the mall. Id. at 570–571. In response, union members handed out fliers at all four entrances to the mall informing the public of the dispute and seeking to use publicity to pressure DeBartolo to hire companies that paid fair wages. Id. The Court ultimately found that "more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B)" and that "the loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." Id. at 578 and 580. In *DeBartolo*, the union did not carry or display picket signs nor did the union members patrol. The Court found that the handbillers actions were not tantamount to picketing and ultimately found that peaceful handbilling of a secondary employer is protected by the First Amendment and not proscribed by Section 8(b)(4) of the Act. Id. at 571.

In 2010, the Board extended the reasoning in *DeBartolo* and found that stationary banners, like handbilling, are noncoercive speech conduct and do not violate Section 8(b)(4)(ii)(B). *Eliason & Knuth of Arizona, Inc.*, 355 NLRB 797 (2010).[11] In *Eliason*, the union placed banners, approximately 3 to 4 feet high and 15 to 20 feet long, on the public sidewalk outside the secondary employer's facility approximately 15 to 1,050 feet from the entrances. Id. at 798. One banner read "SHAME ON [secondary employer]" and "Labor Dispute" while the other read "DON'T EAT 'RA' SUSHI". Id. Several union representatives stood beside each of the stationary banners and offered handbills to passersby. Id.

The Board in *Eliason* determined that the banners are not picketing or tantamount to picketing because "picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite. . . creating a physical, or at least, symbolic confrontation." Supra, at 802. The Board also found that a stationary banner is not otherwise coercive, because, unlike a picket sign, a banner does not create any form of confrontation and members of the public can simply "avert [their] eyes." Id. at 803 (citing *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1214 (9th Cir. 2005)). The Board also found that stationary banners without additional evidence, such as evidence that employees somehow knew to recognize the banner as a signal to withhold their services, were insufficient to establish that the union was engaging in signal picketing. Id. at 805. The Board further concluded that this nonpicketing conduct was not a violation of Section 8(b)(4) because the conduct did not engender the same coercive effects of picketing nor did it disrupt the secondary's operations. Id. at 805–806. The Board held that the banners conveyed speech and, "neither the character nor the size of the banners stripped them of their status as speech or expression." Id. at 809.

In 2011, the Board applied its reasoning in *Eliason* and the D.C. Circuit's reasoning in *Sheet Metal Workers' International Association, Local 15, AFL–CIO v. NLRB* 491 F.3rd 429 (2007) (*Brandon I*) in finding that a large inflatable rat displayed outside the workplace of a secondary employer is not a violation of the Act. *Brandon Regional Medical Center* (*Brandon II)*, 356 NLRB 1290 (2011). The medical facility hired two construction contractors to build an addition to the hospital; however, the two contractors were engaged in a labor dispute with the union regarding use of nonunion labor and wages. Id. at 1290. In addition to stationing a union member holding a leaflet concerning its labor dispute between two outstretched arms aimed at the incoming and outgoing traffic at the hospital's entrance, the union placed an inflated rat balloon on a flatbed trailer parked outside the hospital, approximately 100 feet from the front door. Id. The inflatable rat was approximately 16 feet tall and 12 feet wide with an attached sign reading "WTS". Id. (WTS is identifying "Workers Temporary Staffing," one of the primary contractors). The Board "found no evidence here to support a finding that the display of the inflatable rat. . . constituted nonpicketing conduct that was unlawfully coercive." Id. at 1292.

In *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB 21, 21 (2010) (*Held Properties I*), the Board considered whether a banner display that was preceded by picketing resulted in a meaningful factual distinction that

[10] The evidence does not support that Davis had a presence at the intersection of Old Porter Road and Route 20 in Portage, Indiana or a constant presence at the Division Road construction site throughout the time that Respondent displayed the banner and inflatable rat in these locations. Therefore, Respondent was not free to engage in ongoing picketing of Davis at these locations.

[11] General Counsel contends that *Eliason* and *Brandon II* and cases relying upon the holdings in *Eliason* and *Brandon II* were wrongly decided and should be overturned based upon the rationale contained in the dissent in *Eliason* and reiterated in *Brandon II*. Because I am bound by current Board precedent, I leave those arguments to be considered by the Board. I note that General Counsel makes no argument that Respondent's actions violated Section 8(b)(4) under current Board precedent.

would require a different result than reached in *Eliason.* In that case, the Union conducted 5 days of lawful area standards picketing before discontinuing the picketing and displaying a banner. Id. The picket signs identified only the primary employer, while the banners named only the secondary employer. There was no evidence that employees ceased work. Id. In determining that prior picketing does not result in a banner display being automatically viewed as a continuation of that picketing, the Board relied upon its reasoning in handbilling cases holding that "prior picketing does not render otherwise lawful distribution of handbills unlawful."[12] Id. "Indeed, handbilling has been found lawful even when it immediately followed *unlawful* secondary picketing." Id., and cases cited therein.

In the instant case, the banner and the sign on the inflatable rat's chest contained explicit speech expressing Local 150's opinion that Maglish contracted with a "rat" contractor, and therefore, they implicate First Amendment speech rights as the Board found of the banner and inflatable rat in *Eliason* and *Brandon II*. *Eliason*, supra at 809–810; *Brandon II*, supra at 1293. I find that the language of the banner in connection with the inflatable rat conveys a clear message. Thus, the question here is whether Respondent's displays were conducted in a manner distinct from what occurred in *Eliason* and *Brandon II* that caused the displays to be picketing or otherwise unlawfully threatening, coercive, or restraining to a reasonable person. Here, on each occasion the banner and inflatable rat were stationary, placed in the public right-of-way, and faced public streets. Also, there was no patrolling, carrying of picket signs, chanting, or blocking of ingress or egress. While between one to three Local 150 agents were present in nearby parked cars, there is no evidence that they engaged anyone.[13] A few union agents were present in a more visual fashion in *Eliason* and *Brandon II*.[14]

Nor do I find the location of the display at the residential construction site significantly distinguishable from the facts in *Eliason* and *Brandon II* to warrant a different result here. Giving room for the size of the inflatable rat, the display was approximately 70 feet from where work was being performed on the foundation. While the record is silent about how far the display was from the driveway, I note that large banners placed as close as 15 feet from entrances in *Eliason* were not found coercive. See also, *Southwest Regional Council of Carpenters (New Star General Contractors, Inc.)*, 356 NLRB 613, 617 (2011). Thus, I conclude that the display's proximity to the jobsite in this case was similarly not proscribed by Section 8(b)(4).

General Counsel, in brief, repeatedly refers to the inflatable rat as large and scary.[15] There is nothing in the description of the significantly smaller inflatable rat used in this case that leads me to believe that it was any scarier than the larger, but otherwise visually similar, inflatable rat displayed in *Brandon II*. Similarly, the banner used here was much smaller than the banner used in *Eliason*. Therefore, I find nothing in the size or the appearance of the banner or inflatable rat used in this case was more coercive, threatening, or restraining than those used in *Eliason* and *Brandon II*.

One notable distinction between this case and these other cases is that, here, the banner and inflatable rat were displayed together. Nothing in the record leads me to find that their proximity to each other created any more of an actual or symbolical barrier or confrontation than the larger inflatable rat on a trailer in *Brandon II* or the longer banner in *Eliason*. Therefore, I find their proximity did not cause the display to be considered picketing, tantamount to picketing or otherwise coercive or confrontational implicating Section 8(b)(4) of the Act.

Another notable distinction in this case is that Local 150 maintained a display at the construction site of Carroll's future residence. While this was undoubtably upsetting to Carroll on a personal level, it was his choice, not that of Respondent, to comingle his personal and business lives. I have identified no Board precedent that requires, nor do I conceive of any reason that a union should have to limit its lawful Section 7 activities based upon the choice of an employer to engage employees to perform work at an owner's personal residence.

A final distinction between this case and *Eliason* and *Brandon II* is that the banner and inflatable rat displays followed picketing at the construction site. The facts of the instant case are similar to those in *Held Properties I* where bannering followed lawful area standard picketing. Here, the inflatable rat and banner displays followed unfair labor practice picketing of Davis at the construction site, the lawfulness of which is not disputed. Similar to *Held Properties I*, the picket signs identified only the primary employer,[16] while the banners named only the secondary employer, and there was no evidence that employees ceased work. Here, like in *Held Properties I*, the banner noted the secondary object distinguishing it from the picketing of Davis. Thus, as the Board reasoned in *Held Properties I*, I find that Respondent's otherwise lawful display did not become unlawful simply because it followed lawful picketing.

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[12] See *Laborers Local 332 (CDG, Inc.),* 305 NLRB 298, 304–305 (1991), (holding that a march and rally constituted unlawful picketing, but that the handbilling before and after the rally was lawful); *Operating Engineers Local 139 (Oak Construction),* 226 NLRB 759, 759–760 (1976) (pre-*DeBartolo* holding that simultaneous picketing and handbilling were unlawful, but subsequent lawful handbilling that continued after the picketing ceased was lawful under the "publicity" proviso of Section 8(b)(4)).

[13] While it is not necessary to produce evidence of actual loss of business or refusal on the part of any employee to perform work, make deliveries, etc. for a secondary employer to establish a violation of Section 8(b)(4), such evidence could support a finding of a violation. No such evidence exists in the record.

[14] I note that there was no contention that the lawfulness of the picketing of Davis at the construction site, or Carroll's actions in response to that picketing were affected by Carroll's status as the owner of the residence under construction.

[15] I note that General Counsel had to lead the witness into using the term "scary" to describe the inflatable rat, and even then, he was not using that adjective to describe any impression he had of the inflatable rat, but as speculation on a possible impression of another person. I find any suggestion that the witness subjectively found the inflatable rat to be scary as an inaccurate description of the record.

[16] The record contains no evidence that Respondent's picketing of Davis at the construction site failed to meet the *Moore Dry Dock* standards. *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950).

Having found no evidence that distinguishes the displays in this case that would reasonably cause them to be more coercive, threatening or restraining than those considered by the Board in the *Eliason* and *Brandon II*, and cases relying thereon, I find that Respondent's displays did not violate Section 8(b)(ii)(B).

C. Did Respondent's Banner and Inflatable Rat Displays Violate Section 8(b)(4)(i)(B)?

Section 8(b)(4)(i)(B) states that it is an unfair labor practice to "engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services' where an object thereof is forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person…." 29 U.S.C. § 158(b)(4)(i)(B). The Board has found that a union violates Section 8(b)(4)(i)(B) by engaging in traditional picketing or other coercive conduct of a secondary employer. The Board has also found a violation when a union engages in '"signal picketing," a variant of picketing, defined as "activity short of picketing through which a union intentionally, if implicitly, directs members not to work at the targeted premises." *New Star*, supra, at 615 (quoting, *Eliason*, supra, at 805).

The Board in *Eliason* and *New Star* found that "nothing about the banner displays or any extrinsic evidence indicates any prearranged or generally understood signal by union representatives to employees of the secondary employers or any other employees to cease work." Id. In both cases, the Board noted there was no evidence that the unions requested or otherwise sought "to induce or encourage a work stoppage or refusal to handle goods or perform services" and no evidence of a work stoppage. *Eliason*, supra, at 805, n. 28; *New Star*, supra at 615–616. The Board reasoned that signal picketing "cannot include all activity conveying a 'do not patronize' message directed at the public simply because the message might reach, and send a signal to, unionized employees.' *Eliason*, supra, at 805 (citing *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1215 (9th Cir. 2005).

In *New Star*, the Board, in evaluating whether a banner display was intended to induce employees of the secondary to cease work, considered the lack of evidence showing that the display's presence was timed in coordination with employee start times. The Board noted that those accompanying the banner did not converse with employees other than to distribute handbills. The Board also noted that while one of the displays was as close as 10–15 feet from the entrance for the secondary's employees, it was facing a busy public street, and therefore, not "de facto directed only at neutral employees." Supra, at 617 (distinguishing *Warshawsky & Co. v. NLRB*, 182 F.3d 981, 984, 953 (D.C. Cir 1999).

The Board in *Newstar* reiterated that legitimate purposes for such displays exist by noting that:

> A union may lawfully appeal to those "consumers" of a primary construction employer's services to cease doing business with the primary employer so long as the appeal is not backed by any coercion forbidden by Section 8(b)(4)(ii). In fact, the Unions here appealed to the secondary employers via letter to do exactly that prior to the commencement of the banner displays. Finally, a union may want to communicate with employees of secondary employers about a labor dispute for many reasons other than to induce them to stop work. Educating the employees of the secondary employers, particularly those who are union members, about the dispute may cause them to speak with the managers of the primary employer and urge them to respect area standards or to talk with the employees of the primary employer, express their solidarity, and encourage them to seek to improve their wages and other terms of employment. . . . Among all these lawful messages the Unions sent by protesting substandard wages at the construction sites, we do not find, without any further evidence, that employees of secondary employers on the site would reasonably understand the protest to be implicitly sending the message forbidden by Section 8(b)(4)(i)(B). Supra, at 617-618 (internal citations omitted).

As discussed above, I find no evidence of picketing, conduct tantamount to picketing, or otherwise coercive conduct that would establish that Respondent's conduct violated Section 8(b)(4)(ii)(B) of the Act. Additionally, there is insufficient evidence that the displays were specifically directed at employees of Maglish or other employees. The record does not contain information about when and how frequently employees passed or were present at either of the locations where Respondent erected displays. The record reflects that Carroll witnessed the display at the intersection near Maglish's shop at 7:30 a.m. on two mornings but there is no evidence how long it was maintained there each day. Also, General Counsel submitted no evidence about whether Maglish employees, suppliers, or other employees go to the shop, and if so, when and how often. Similarly, the record contains no evidence about which, if any, employees, suppliers, etc., were present at the construction site while the display was erected there.

Also, the record contains no evidence of communication between Respondent and employees that would have established the display as a signal for employees to honor. Similarly, there is insufficient evidence to find that the display acted as a preestablished signal to unionized employees. The evidence of unionized employees' presence at either location while the displays were present is limited to the removal of Davis' dozer from the construction site. Such limited evidence of unionized employee presence precludes a finding that the displays were erected to signal such employees.[17] Finally, the record contains no evidence of any employee, supplier, etc. withholding services.

Accordingly, I find insufficient evidence that Respondent violated Section 8(b)(i)(A) of the Act.

[17] While it is not necessary to establish that any employee, supplier, etc. withheld labor or services to prove a violation of Section 8(b)(i)(B) occurred, such evidence would support such an argument. I note that there is no such evidence of record.

CONCLUSIONS OF LAW

1. Maglish Plumbing, Heating & Electric, LLC (Maglish) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 150, a/w International Union of Operating Engineers, AFL–CIO (Respondent) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent's displays directed at Maglish sought, at least in part, to address its primary labor dispute with Davis & Son Excavation (Davis). Maglish was a secondary employer to that dispute by virtue of its contracts with Davis.

4. Respondent has not violated Section 8(b)(4)(i) or (ii)(B) of the Act by displaying a banner and an inflatable rat at the intersection of Old Porter Road and Route 20 in Portage, Indiana or at the construction site on Division Road, Valparaiso, Indiana.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[18]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. October 16, 2019

[18] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.